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on behalf of themselves and others similarly situated

UNITED STATES DISTRICT COURT

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, California Department of Justice and Director of the California Department of Justice; and MICHAEL HENNESSEY, Sheriff, San Francisco County,

Defendants.

Civil Case No. 09-04779 CRB

NOTICE OF MOTION, MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

CLASS ACTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

RULES

NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

NOTICE IS HEREBY GIVEN that on Friday, December 4, 2009 at 10:00 a.m., or as soon thereafter as counsel may be heard by the above-entitled Court, located at United States Courthouse, 450 Golden Gate Avenue, Courtroom 8, San Francisco, California, Plaintiffs Elizabeth ("Lily") Aida Haskell and Reginald Ento, on behalf of themselves and others similarly situated, will and hereby do move this Court for a preliminary injunction under Fed. R. Civ. P. 65.

Plaintiffs request that this Court enjoin the enforcement of California Penal Code § 296(a)(2)(C), which provides for the mandatory DNA sampling of persons arrested on suspicion of a felony but not convicted, on the grounds that it violates the Fourth and Fourteenth Amendments of the U.S. Constitution. Specifically, Plaintiffs seek a preliminary injunction enjoining Defendants, including Defendants' agents and other persons in active concert or participation with Defendants, from acting under the authority of California Penal Code § 296(a)(2)(C) to seize, search, analyze, or make any use of DNA samples or any analysis of DNA samples taken from persons arrested for, but not convicted of, a crime.

Plaintiffs ask for this preliminary relief pending a trial on the merits or until further relief may be granted, or this Court orders otherwise.[1]

This Motion is supported by the accompanying Memorandum of Points and Authorities, the Declarations of Plaintiffs Lily Haskell and Reginald Ento, the Declarations of Peter C. Meier, Michael T. Risher, Professor Bruce Budowle, Professor Robert L. Nussbaum, M.D., Sara Huston Katsanis, Professor Troy Duster, and Helen Wallace, the argument of counsel, and such other evidence as may be presented at or before any hearing.

[1] Plaintiffs ultimately seek to enjoin all California law enforcement from collecting, analyzing, or databanking DNA pursuant to § 296(a)(2)(C), as well as a declaration that § 296(a)(2)(C) is unconstitutional.

SUMMARY OF ARGUMENT

This class action presents a facial challenge to California Penal Code § 296(a)(2)(C), which, as of January 1, 2009, requires that any person arrested on suspicion of a felony provide a DNA sample. Extraction of the sample occurs at booking, without any judicial or prosecutorial oversight; refusal to provide a sample is a crime and can result in the immediate use of force to compel compliance. The DNA samples are analyzed and the resulting digitized DNA profiles are uploaded to a nationwide criminal databank where they are searched against thousands of other profiles. There is no automatic expungement for arrestees who are never convicted; to the contrary, people like the named plaintiffs who are released without ever being charged must wait for at least three years before they can even apply for expungement, with no guarantee of ultimate success and no review of the denial of a request. Cal. Penal Code § 299. There is no provision for appointment of counsel to assist in expungement proceedings.

Plaintiffs ask this Court to issue a class-wide preliminary injunction on the grounds that this wholesale DNA testing violates the Fourth and Fourteenth Amendments. Plaintiffs are able to establish the prerequisites for a preliminary injunction: (1) they are likely to succeed on the merits, (2) they face irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Winter v. N.R.D.C.*, 129 S. Ct. 365, 374 (2008).

Plaintiffs will succeed on the merits because the Fourth Amendment prohibits the police from compelling an arrestee to provide a tissue sample unless 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*, 568 F.3d 1119, *amended by* 580 F.3d 847, 852 (9th Cir. 2009), *reh'g denied and reh'g en banc denied*.

Plaintiffs will thus likely succeed on the merits, because, as the Ninth Circuit held in *Friedman*, the warrantless extraction of DNA from arrestees violates the Fourth Amendment. Furthermore, mandatory DNA testing violates the right to informational privacy guaranteed by

the Fourth and Fourteenth Amendments. *See Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1269 (9th Cir. 1998). All the other prerequisites for preliminary relief are satisfied, because an injunction is necessary to prevent the violation of the constitutional rights of the tens of thousands of Californians who are arrested each year on suspicion of a felony but are not charged or convicted of anything.

The proposed class in this case includes all "persons who are, or will be, compelled to submit to the search and seizure of their body tissue and DNA under § 296(a)(2)(C) solely by reason of the fact that they have been arrested for, or charged with, a felony offense." Defendants have stipulated that any relief the Court grants on this Motion will apply to such persons (as well as to the named Plaintiffs). (*See* Docket Nos. 10, 11.) Because the Attorney General's office is statutorily responsible for implementing the entire program of seizing, analyzing, and databanking arrestee DNA, an injunction against him will protect the rights of the entire class.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As of January of this year, California law requires law enforcement officers to seize the DNA of every adult arrested for any felony, based solely on the fact of arrest. Cal. Penal Code § 296(a)(2)(C).[2] This seizure occurs immediately after arrest, without probable cause to believe it will reveal evidence of any crime, and without any judicial or even prosecutorial oversight. The government then analyzes the DNA, generates a DNA profile, and uploads that profile into a database. This database is used by local, state, and national law enforcement agencies to identify criminal suspects. The DNA profiles remain in the database forever, and the government retains the arrestees' original biological samples. Arrestees who want to have their biological samples destroyed or their DNA profile expunged from the database must pursue an onerous process with no promise of success, and those not charged with a crime must wait until the statute of limitations to bring charges has expired before they can even begin the process.

Plaintiffs Lily Haskell and Reginald Ento were subject to this forced, non-consensual DNA seizure earlier this year, even though they were never charged with any crime, simply because one of them was arrested at a political rally and the other allegedly possessed stolen property. Their DNA – their genetic blueprint – is now stored in a state crime lab, subject to analysis and search, and their DNA profile will be included and searched in the nationwide database for years to come. Haskell and Ento represent the thousands of presumptively innocent Californians subject to this mass, programmatic seizure of DNA from arrestees. They move on behalf of themselves and the class[3] for a preliminary injunction to enjoin Defendants from searching and seizing their DNA, pending trial.

As set forth below, Plaintiffs are likely to succeed on the merits of their claims that

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[2] All statutory references are to the California Penal Code unless otherwise indicated.

[3] The proposed class includes all "persons who are, or will be, compelled to submit to the search and seizure of their body tissue and DNA under § 296(a)(2)(C) solely by reason of the fact that they have been arrested for, or charged with, a felony offense." (Compl. ¶ 24.) Defendants have stipulated that any relief granted on this Motion will apply both to the named Plaintiffs as well as to all persons who are, or will be, compelled to submit to the search and seizure of their body tissue and DNA under Cal. Penal Code § 296(a)(2)(C) solely by reason of the fact that they have been arrested for, or charged with, a felony offense. (*See* Docket Nos. 10, 11)

§ 296(a)(2)(C) violates the Fourth and Fourteenth Amendments; Plaintiffs face irreparable harm in the absence of an injunction; the balance of equities tips in Plaintiffs' favor; and an injunction will further the public interest.

II. BACKGROUND AND STATEMENT OF FACTS

A. History of § 296(a)(2)(c).

Section 296(a)(2)(C) was enacted by a 2004 voter initiative, Proposition 69. Proposition 69 dramatically expanded the scope of suspicionless and warrantless DNA seizures from persons in California: Before November 2004, California required DNA testing only from individuals who had been *convicted* of certain serious and violent crimes. *People v. Espana*, 137 Cal.App.4th 549, 551 (2006). Proposition 69 immediately expanded this to include persons convicted of any felony. § 296(a)(1). And, a part of the initiative that went into effect on January 1, 2009, further expanded mandatory DNA testing to cover any adult merely arrested for any felony. § 296(a)(2)(C); *see* Compl., Ex. A at § III(3) (copy of Proposition 69). As a result, California now has one of the nation's most expansive programs for the compulsory seizure, retention, and sharing of DNA data. Indeed, California law enforcement officials have described California's program as "[t]he third largest DNA database in the world[.]" (Meier Decl., Ex. B.)

The statute and implementing rules require collection "immediately following arrest, or during the booking [] process or as soon as administratively practicable after arrest, but, in any case, prior to release on bail or pending trial or any physical release from confinement or custody." § 296.1(a)(1)(A); Meier Decl., Ex. A at 2 (Cal. A.G. DNA Information Bulletin 08-BFS-02 providing that "DNA collection of arrestees should occur at booking[.]")[4] Collection is mandatory; refusal to submit is a misdemeanor and can result in the immediate, warrantless, forcible extraction of a tissue sample. § 296.1(a), (d); § 298.1(a), (b).

This mandatory DNA seizure applies to anybody arrested for *any* felony, including felonies for which an arrestee's DNA has virtually no relevance, such as computer hacking, shoplifting, writing a bad check, accepting a bribe to throw a sporting event, or simple unauthorized possession of a controlled substance, including codeine. *See* Cal. Penal Code §§ 502, 115.1, 476a, 532,

[4] These DNA Information Bulletins are binding on local police agencies. § 295(h)(1).

484/666, 337c; Cal. Health & Safety Code § 11350.

B. How An Arrestee's DNA is Analyzed and Uploaded into CODIS.

After the initial seizure of biological material, the samples are then sent to a lab – usually the Bashinski DNA Laboratory in Richmond, California – where they are eventually[5] analyzed to create a genetic profile, the so-called DNA fingerprint. The profile is a digital representation of thirteen particular segments of the subject's DNA. (Budowle Decl. at ¶ 24; Katsanis Decl. at ¶¶ 12, 18.) This profile is then uploaded into the State's DNA databank, which is part of the nationwide Combined DNA Index System ("CODIS"), a centralized, searchable law enforcement database accessible to local, state, and federal law enforcement agencies. (Budowle Decl. at ¶¶ 15-16; Katsanis Decl. at ¶ 19; *see United States v. Kincade*, 379 F.3d 813, 817-20 (2004) (9th Cir. 2004) (*en banc* plurality opinion).) The biological samples themselves are retained indefinitely at the lab for possible additional, more sophisticated testing.

Once an arrestee's profile is uploaded into CODIS, it is immediately compared to the thousands of crime-scene samples in the CODIS forensic database. As long as the arrestee's profile remains in CODIS, any new crime-scene samples will be searched against it. A search of the entire system (all crime-scene DNA profiles and all known individual profiles) is performed once a week. *Birotte v. Superior Court*, 177 Cal. App. 4th 559, 565 (2009).

CODIS searches can affect the person whose profile is included in the database in several ways. When an arrestee profile exactly matches a crime-scene profile – which could indicate that the person had been at a crime scene at some point – CODIS notifies the agency that provided the sample. *Id.* That agency will typically then provide the identity of the arrestee to the agency with jurisdiction over the crime so that it can follow up. California also authorizes the use of its database for so-called familial searching, where law enforcement uses the DNA database to focus on a person whose DNA does *not* match the crime-scene evidence – and who is therefore demonstrably innocent of the crime – but whose profile is instead *similar* to DNA taken from a crime scene, based on the hope that the culprit may be related by blood to the known person who provided the

[5] Because of California's enormous backlog of DNA samples (over 58,700 as of September 2009), this analysis may not occur for months after collection. (Risher Decl. at ¶¶ 8-10.) The state does not track this time lag. (*Id.* at ¶ 7.)

similar sample. (Katsanis Decl. at ¶ 26; Risher Decl., Exs. I, J.)[6]

This routine CODIS searching continues as long as an arrestee's profile is in the databank, even after an arrestee is released without charges, acquitted, or found factually innocent by a court, because there is no automatic expungement procedure in California. To the contrary, former arrestees who wish to have their samples removed must navigate a long and cumbersome process. Individuals like Plaintiffs Haskell and Ento, who were never even charged with a crime, must wait until the statute of limitations has run before they can apply for expungement. § 299(b)(1); Meier Decl., Ex. D at 5. This means a delay of at least three years and, in some cases, much longer. *See* Cal. Penal Code §§ 799-801. Then, after requesting relief and notifying the Department of Justice, former arrestees will face an additional delay of at least 180 days before any court can authorize expungement. § 299(c)(2)(D). Even then, the court has "the discretion to grant or deny the request for expungement," and "the denial of a request for expungement is a nonappealable order and shall not be reviewed by petition for writ." § 299(c)(1). Finally, the government will not destroy the sample if there is "an objection by the Department of Justice or the prosecuting attorney." § 299(c)(2)(D). This arduous procedure, including the unreviewable discretion to deny expungement, applies even to individuals who have obtained a judicial declaration of factual innocence. § 299(b)(3). There is no provision for appointment of counsel to assist in this complicated procedure.

Thus, a wrongfully arrested person – even one who has been found factually innocent and who hires a lawyer to pursue expungement of her DNA – will have her genetic blueprint included in a criminal database for continual search and her physical DNA sample stored and subject to further genetic analysis at any time, for long after she has been wrongfully arrested, with absolutely no recourse in the state courts. Arrestees who are not in a position to hire a private lawyer to navigate this complicated, time-consuming process will likely remain in the system forever.[7]

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[6] *See* Henry T. Greely, Daniel P. Riordan, Nanibaa' A. Garrison, Joanna L. Mountain, *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, Journal of Law, Medicine & Ethics, 34:248-62 (Summer 2006). Both the California and federal Departments of Justice have authorized the use of their databanks for this purpose. (Risher Decl. at ¶¶ 11-12.)

[7] 80% of those facing felony charges in California are represented by the public defender and thus indigent; this figure does not include indigent defendants with court-appointed private counsel. California Commission on the Fair Administration of Justice: Official Report and

C. The Constitutional Rights of Plaintiffs Haskell and Ento Were Violated When They Were Each Forced to Provide DNA Samples Upon Arrest.

The experiences of Plaintiffs Lily Haskell and Reginald Ento illustrate how this statutory scheme works in practice. Ms. Haskell was arrested on March 21, 2009 at a peace rally in San Francisco for allegedly trying to free another protestor who had been taken into custody. (Haskell Decl. at ¶ 4.) Upon arrest, Ms. Haskell was transported to jail and ordered to provide a DNA sample. (*Id.* at ¶ 5.) Ms. Haskell was told that if she refused to comply immediately and without advice from a lawyer she would be charged with a separate misdemeanor and would not be released from jail until after arraignment. (*Id.*; *see* § 299.1(a).) Ms. Haskell would have refused to give a sample but she did not want to be charged with a misdemeanor for refusing to do so, as threatened by jail personnel. (*Id.* at ¶¶ 5-7.) Ms. Haskell was never charged with any crime. (*Id.* at ¶ 8.)

Plaintiff Reginald Ento was arrested in early 2009 for alleged possession of stolen property. (Ento Decl. at ¶ 3.) Pursuant to the requirements of section 296(a)(2)(C), and without a warrant, a sheriff's deputy collected a DNA sample from Mr. Ento by inserting a swab into his mouth and scraping cells from the inside of his cheek. (*Id.* at ¶¶ 4-5.) Mr. Ento was eventually released and the allegations against him were dropped without his ever appearing in court. (*Id.* at ¶6.)

Even though neither of them was even charged with any crime, Ms. Haskell's and Mr. Ento's DNA samples have been or soon will be analyzed and their respective DNA profiles uploaded into CODIS, where they will be subject to routine searching by law enforcement. Their seized biological samples will also be retained and may be subject to further analysis. There is no legal basis for the retention of their seized DNA samples or profiles other than § 296(a)(2)(C).

In summary, continued enforcement of § 296(a)(2)(C) will result in the seizure, analysis, and indefinite retention of the DNA of tens of thousands of innocent Californians every year.[8] As

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Recommendations on Funding of Defense Services in California, p.6, available at: http://ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20DEFENSE%20SERVICES.pdf. Nationwide, the figure is 82%. *See* U.S. Dep't of Justice Bureau of Justice Statistics, Indigent Defense Statistics, available at http://www.ojp.gov/bjs/id.htm. This percentage is even higher for African American and Latino defendants. *Id.*

[8] According to the California Department of Justice, of the approximately 332,000 people arrested for felonies in California in 2007 (the last year for which figures are available), more than 100,000 were not convicted of any crime, and about 52,000 of those were *never even charged* with a crime. (Meier Decl., Ex C at p. 147, Table 37.)

discussed below, California's warrantless, mandatory, suspicionless DNA testing of all felony arrestees pursuant to § 296(a)(2)(C) violates the Fourth and Fourteenth Amendment rights of these thousands of presumptively innocent people and should be enjoined.

III. THIS COURT SHOULD ENJOIN THE ROUTINE, WARRANTLESS SEIZURE, ANALYSIS, AND DATABANKING OF PLAINTIFFS' DNA AS VIOLATING THE FOURTH AND FOURTEENTH AMENDMENTS.

"A plaintiff seeking a preliminary injunction must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, that (3) the balance of equities tips in his favor, and (4) that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 374 (2008) (numbering added). As shown below, Plaintiffs are entitled to a preliminary injunction because § 296(a)(2)(C) violates the Fourth and Fourteenth Amendments, which constitutes irreparable harm, and enjoining the wholesale violation of a constitutional rights is in the public interest.

A. Plaintiffs Are Likely To Succeed on the Merits Because § 296(a)(2)(C) Authorizes Unreasonable Searches and Seizures.

Warrantless searches "are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (citations omitted). The state thus bears the burden of showing that warrantless searches or seizures like those here at issue are reasonable and therefore constitutional. *Friedman v. Boucher*, 568 F.3d 1119, *amended by* 580 F.3d 847, 852 (9th Cir. 2009), *reh'g denied and reh'g en banc denied*; *United States v. Davis*, 332 F.3d 1163, 1168 n.3 (2003).

1. The Compulsory Taking of a Biological Sample and the Subsequent DNA Analysis Constitute a Search and a Seizure.

The compulsory seizure of body tissue by law enforcement for purposes of DNA testing constitutes a search. *Friedman,* 580 F.3d at 852; *United States v. Kriesel*, 508 F.3d 941, 946 n.6, 948 (9th Cir. 2007). A further search occurs when the government analyzes the seized body tissue and uploads the resulting DNA profile into CODIS, where it is compared against a forensic index. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989) ("The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests."); *United States v. Mulder*, 808 F.2d 1346, 1348-49 (9th Cir. 1987).

Here, California law enforcement officials seized DNA samples from the inner cheeks of Plaintiffs without a warrant. Plaintiffs' cells have been, or soon will be, analyzed in order to construct their DNA profile for upload into CODIS. *See* § 296.2. Therefore, Plaintiffs have been searched and their DNA seized and searched. *Friedman*, 580 F.3d at 852-53; *Kincade*, 379 F.3d at 821 n.15. The searches and seizures here are thus *per se* unreasonable unless the government can show that they fall within an established exception to the warrant requirement.

2. Seizing and Searching the DNA of People Simply Because They Have Been Arrested is Unreasonable and therefore Unconstitutional.

The Fourth Amendment prohibits law enforcement from intruding into the body of arrestees to seize biological evidence unless they have either a warrant *or* both probable cause to believe that an examination of the sample will produce 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); *Ellis v. City of San Diego*, 176 F.3d 1183, 1191-92 (9th Cir. 1999). The Ninth Circuit recently held that this rule governs the collection of DNA from arrestees by means of a buccal swab, and that police violated an arrestee's clearly established rights by using a swab to seize a DNA sample without a warrant or exigent circumstances. *Friedman*, 580 F.3d at 856-57, 859.

Friedman controls the case at bar. Neither probable cause nor exigent circumstances exists here: Section 296(a)(2)(C) applies indiscriminately to all felony offenses whether or not DNA evidence is relevant to the crime charged. And, even if probable cause were present, there is no exigency, because DNA is immutable (which is what makes it valuable for identification purposes). *Barlow v. Ground*, 943 F.2d 1132, 1138 (9th Cir. 1991). Mandatory arrestee DNA sampling laws are thus unconstitutional under *Schmerber*. *In the Matter of the Welfare of C.T.L.*, 722 N.W.2d 484, 488-91 (Minn. App. 2006) (statute mandating DNA collection of pre-trial detainee violates Fourth Amendment); *United States v. Purdy*, 2005 WL 3465721, *7 (D. Neb. Dec. 19, 2005) (state law requiring arrestees to provide DNA violates Fourth Amendment).

Although some courts have justified DNA testing of convicted felons under the special-needs exception to the warrant requirement, based on the need to supervise and rehabilitate convicted persons, that exception cannot apply here because the primary purpose of arrestee DNA

testing is to solve crimes, a law-enforcement purpose.[9] *Kriesel*, 508 F.3d at 949-50; *Friedman,* 580 F.3d at 853. Such purposes do not constitute special-needs, and the exception is therefore inapplicable. *Friedman*, 580 F.3d at 853; *see Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001) ("special needs" not applicable if primary purpose of seizure of bodily fluid is law enforcement); *Purdy*, 2005 WL 3465721 at *4-7 (special needs cannot justify arrestee DNA testing).

Some other courts have justified DNA testing of convicted felons by weighing the government's need to supervise, rehabilitate, and control such persons against the limited privacy rights such persons enjoy as a result of their status as convicted felons. But this approach cannot be applied to arrestees because *Schmerber* has already determined the proper balance between an arrestee's right against bodily intrusions and the government's interest in collecting evidence. Because *Schmerber*'s holding applies, arrestee DNA extraction cannot be justified – or even properly analyzed – under a general balancing test. *Friedman*, 580 F.3d at 856-58; *C.T.L.*, 722 N.W.2d at 491; *see Purdy*, 2005 WL 3465721 at *4-7.[10] Thus, the initial extraction of DNA from arrestees, without a warrant or exigent circumstances, violates the Fourth Amendment.[11]

B. Plaintiffs Are Likely To Succeed on the Merits Because § 296(a)(2)(C) Violates Arrestees' Right to Informational Privacy under the Fourth and Fourteenth Amendments

Mandatory DNA testing infringes upon additional constitutional interests wholly distinct from those involved in the initial physical intrusion. Both the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment protect the privacy of our genetic information.

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[9] CODIS exists to solve crimes. (Budowle Decl. at ¶ 14; Katsanis Decl. at ¶¶ 18-21.) Proposition 69 made it clear that the purpose of expanded testing was to solve crimes: it 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." Compl., Ex. A at § II(c), (d)(1).

[10] Even if a general-balance analysis were appropriate, the government interest in arrestee testing does not outweigh an arrestee's interest in physical integrity and genetic privacy interests, as discussed below.

[11] The intrusiveness of DNA testing, by whatever means, is vastly greater than the mere physical intrusion because of the serious genetic privacy interests at stake. *See Kincade*, 379 F.3d at 873 (Kozinski, J., dissenting). It is therefore likely that warrantless testing would not be allowed even if *Schmerber*'s requirements were met. *See United States v. Vance*, 62 F.3d 1152, 1156 (9th Cir. 1995) ("As the search becomes more intrusive, more suspicion is needed.").

Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260, 1269, 1270 (9th Cir. 1998). Such intrusions violate the Fourth Amendment unless the government demonstrates that its need for the information outweighs the individual's privacy interests. *Id*. Similarly, they violate the Due Process Clause unless the government can meet its "burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Nelson v. National Aeronautics and Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008).[12] Because the genetic privacy interests of people who have merely been arrested outweigh the government's interest in analyzing the DNA of such presumptively innocent persons, § 296(a)(2)(C) fails both of these tests.

1. DNA Contains Highly Private Medical and Personal Information.

As discussed at length in the expert declarations submitted with this motion, DNA is our genetic blueprint, and with every passing year science learns how to unlock its secrets to discover more and more about us. DNA analysis can reveal a host of private information about a person, including familial relationships, the existence of potential for physical diseases such as sickle-cell anemia, cystic fibrosis, and Alzheimer's disease. (Nussbaum Decl. at ¶¶ 21-23; Katsanis Decl. at ¶¶ 5-7, 26-27; Duster Decl. at ¶¶ 19, 21; *see Kriesel*, 508 F.3d at 947-48; *Kincade*, 379 F.3d at 841-42 (Gould, J., concurring); *Kincade*, 379 F.3d 849-51 (Reinhardt, J., dissenting); *Kincade*, 379 F.3d at 873-75 (Kozinski, J., dissenting); *Norman-Bloodsaw*, 135 F.3d at 1269 ("One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic make-up.").) As these same authorities discuss, that our DNA contains – or is thought to contain – this extensive personal information leads to a potential for misuse of the seized tissues.[13] Thus, compulsory DNA seizure by law enforcement constitutes a serious intrusion into a person's genetic privacy.

2. Arrestees Enjoy A Higher Expectation of Privacy In their Personal Genetic Information Than do Convicted Felons.

These privacy interests are not diminished because Plaintiffs have been arrested.

[12] This protection applies even when there has been no search or seizure. *Nelson*, 530 F.3d at 877-78.

[13] (*See, e.g.*, Duster Decl. at ¶¶ 19- 25 (discussing history and concluding that "[t]he potential for misuse of this highly sensitive data is staggering."); Nussbaum Decl. at ¶¶ 23-26; Katsanis Decl. at ¶¶ 26- 28.)

Individuals who have merely been arrested or charged with a crime enjoy a much higher expectation of privacy than do persons serving a sentence of incarceration or supervised release following a felony conviction. Conviction of a felony carries serious consequences; one of these is that sentenced felons have "severely diminished expectations of privacy by virtue of their status alone." *Samson v. California*, 547 U.S. 843, 852. Thus, they can be required to submit even those aspects of their lives most protected by the Fourth Amendment to suspicionless searches. *United States v. Lopez*, 474 F.3d 1208, 1213-14 (9th Cir. 2007) (home search); *Kincade*, 379 F.3d at 836 (DNA search).

In contrast, persons who have merely been arrested are presumed innocent; their privacy can only be infringed to further interests such as officer safety or jail security. *Friedman,* 580 F.3d at 857; *see Gant*, 129 S. Ct. at 1719-23 (arrest does not create police "entitlement" to search unjustified by officer safety or preservation of evidence). Even a lawful arrest means only that a single police officer reasonably suspects a crime may have been committed. The factors that allow for unlimited searches of convicted felons – the risks of recidivism and the need to rehabilitate, punish, and control – do not apply to people who are presumed innocent. *Friedman*, 580 F.3d at 858; *United States v. Scott*, 450 F.3d at 873-74 (warrantless search and drug test of a pretrial releasee violates Fourth Amendment). Because DNA testing does not relate to officer safety or jail security, arrestees' expectation of privacy in their DNA is undiminished and fully protected by the Fourth Amendment. *See Friedman*, 580 F.3d at 847 ("[T]here is no support for the government's contention that Friedman's status as a pre-trial detainee justifies forcible extraction of his DNA.").

3. Blanket DNA Testing of Arrestees Will Not Promote Legitimate Government Interests.

On the other side of the balance, the automatic and warrantless seizure of DNA from felony arrestees will not further either of the only two possible legitimate government interests at play here: solving crimes and the accurate identification of arrestees. Regardless of the government interests asserted by Defendants, Plaintiffs' privacy interests outweigh any government interest.

First, merely increasing the number of arrestee profiles in a government databank, without regard to the nature of the offense, does not enhance the databank's effectiveness as a crime solving

tool. The only reliable data on this topic come from the United Kingdom, which began mandatory testing of all arrestees in April 2003.[14] Expansion of the databank to include arrestees failed to increase the databank's efficacy in solving crime. (Wallace Decl. at ¶¶ 13-26.) This makes sense, because arrestees may well be innocent or involved only in criminal activity for which DNA evidence is irrelevant. Resources being spent on arrestee testing would better be used to analyze and upload crime-scene samples into CODIS in a timely matter, which would increase the databank's effectiveness. (*See id.* at ¶¶ 16-17.) Blanket DNA testing of arrestees drains resources and increases the backlogs and the resulting delays. (Katsanis Decl. at ¶ 21.) Such testing therefore actually *diminishes* the effectiveness of the databank and the ability of law enforcement to use DNA to timely solve crimes.

Given the similarities between the UK program and the one at issue here, these data show that California's inclusion of adult felony arrestees' DNA profiles will not lead to a material increase in the number of crimes solved. (Wallace Decl. at ¶¶ 15-16, 26-29.) And the foremost experts in the use of DNA and CODIS here in the United States agree that there is no evidence that expanding CODIS to include seized tissues from mere arrestees will increase CODIS's effectiveness. Professor Bruce Budowle, who during his 26 years with the FBI's Laboratory Division served as program manager for DNA research, as Chief of the Forensic Science Research Unit, and as Senior Scientist for the Laboratory Division of the FBI, is an expert in the use of DNA and DNA databanks in the criminal justice system and was largely responsible for finalizing the standards of CODIS as it is now used in DNA typing. (Budowle Decl. at ¶¶ 6-7, 9, 24.) Budowle states that it is impossible to evaluate CODIS's effectiveness in solving crimes because of the inadequacies in how the government collects data. (*Id.* at ¶¶ 26-30.) If such evidence were available, it would doubtless mirror that from Britain's similar database and show that arrestee testing does not significantly help to solve crimes. (Wallace Decl. at ¶¶ 13-26.)

Mandatory seizure of DNA of all felony arrestees will also produce a number of unintended

[14] The UK practice of retaining the DNA of persons arrested but not convicted was recently invalidated 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). The full opinion is also available at http://www.bailii.org/eu/cases/ECHR/2008/1581.html.

consequences. As noted above, it increases backlogs and diverts resources that could be used to timely test and upload crime-scene samples. It will exacerbate distrust of law enforcement as those who are arrested – lawfully or not -- will have their DNA profiles entered into the database. (Duster Decl. at ¶ 29.) Persons in the database – and, with familial searching, their families -- are automatic suspects in any crime involving DNA evidence. The burden will fall most heavily on racial minorities, who are disproportionately overrepresented in California's criminal justice system and will face the most difficulties in getting their profiles removed from the system. (*Id.* at ¶ 29-30.) Arrestee testing also brings with it the risk that officers will make a custodial arrest because they want to take a DNA sample from a person. *See Gant*, 129 S. Ct. at 1720 n.5. It also exacerbates the existing DNA backlogs and leads to delays in testing samples taken from convicted offenders and crime scenes. (Katsanis Decl. at ¶¶ 21, 33; Risher Decl. at ¶¶ 7-10.)

Finally, DNA is not useful in verifying the identity of arrestees. Creating a DNA profile from a tissue sample takes a minimum of 24 hours of laboratory work, which is typically spread out over several days. (Katsanis Decl. at ¶¶ 16-17.) To this must be added the time spent transporting the tissues to the lab for testing; and because of the backlog of untested tissue, the time from taking a sample to getting an analysis, in reality, is more than two months. (*Id.* at ¶ 21; Risher Decl. at ¶¶ 7-10.)

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. (Risher Decl. at ¶ 3.) The FBI further promises that fingerprint comparison "offers[s] an infallible means of personal identification." (*Id.* at ¶ 4.) California's protocol in fact requires that, in order to prevent duplicative testing, officer identify an arrestee through his fingerprints *before* seizing DNA.[15] (*Id.* at ¶¶ 5-6.) And even after tissue is seized and analyzed, there is no provision for checking to see whether that sample matches another known sample (arrestee samples are only checked against crime-scene samples). Thus, seizing DNA samples has absolutely no relationship

[15] The Fourth Amendment prohibits a warrantless intrusion into an arrestee's body for information that the government already possesses. *Nelson v. City of Irvine*, 143 F.3d 1196, 1203-05, 1207 (9th Cir. 1998).

to the goal of ascertaining the true identity of arrestees or persons to be released pending trial.

C. Without Injunctive Relief, Plaintiffs Will Suffer Irreparable Harm.

In addition to the initial search and seizure of Plaintiffs' biological material, the Fourth Amendment is violated when law enforcement analyzes Plaintiffs' DNA and then searches Plaintiffs' DNA profiles in CODIS. *Skinner*, 489 U.S. at 616-17; *Kincade*, 379 F.3d at 873 (Kozinski, J., dissenting) ("[T]he Fourth Amendment intrusion here is not primarily the taking of the blood, but the seizure of the DNA fingerprint and its inclusion in a searchable database."). The inclusion of Plaintiffs' DNA profile in a searchable database for a minimum of three years will result in ongoing violations of Plaintiffs' rights based upon California's unjustified seizure of their DNA. And without an injunction, class members will suffer invasions of their bodily integrity and privacy as their DNA is collected, analyzed, and databanked.

In general, "the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" for the purposes of a preliminary injunction. *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (Fourth Amendment). The threat of the loss of Fourth Amendment and informational privacy rights in this case therefore constitutes irreparable harm as a matter of law. *Id.*[16]

D. The Balance of Equities Tips In Favor of Plaintiffs.

Under section 295 *et seq.*, Plaintiffs have been compelled to submit to an invasive, state-mandated procedure designed to extract the most personal and private information – their unique genetic code. Without preliminary relief, their DNA profiles will remain in the CODIS databank subject to search, and the samples themselves will remain subject to further analysis and misuse, a danger of concern to plaintiffs. (Haskell Decl. at ¶ 16; Ento Decl. at ¶ 8; Nussbaum Decl., ¶ 24-26; Katsanis Decl. at ¶ 22-23.) Unless they are enjoined, Defendants will invade the privacy of a huge class of persons who enjoy a presumption of innocence and an expectation of privacy in this information.

[16] *Accord Nelson v. National Aeronautics and Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008) (informational privacy); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996) (Fourth Amendment); *Norman-Bloodsaw*, 135 F.3d 1260, 1275 (Fourth Amendment genetic privacy); *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (1984) (Fourth Amendment); *AFT v. Kanawha Cnty. Bd. of Educ.*, 592 F. Supp. 2d 883, 905 (S.D.W.V. 2009) (Fourth Amendment).

Defendants will not suffer any comparable harm. First, the government has no legitimate interest in continuing to violate the Fourth Amendment. *Zepeda*, 753 F.2d at 727; *AFT*, 592 F.Supp.2d at 905. Moreover, Defendants will still continue to identify arrested persons by taking their fingerprints and will continue to be able to collect DNA samples immediately upon conviction, or with a warrant or consent, or if necessary under *Schmerber*. This is the protocol that had been in place up until this year, and it is the process that the state is still using with respect to persons who were arrested before January 1, 2009 (and therefore did not give samples upon arrest)[17] and whose cases are still pending. For these reasons, the balance of equities tips in favor of Plaintiffs. *See Nelson*, 530 F.3d at 882.

E. A Preliminary Injunction Advances the Public Interest.

Under our system of checks and balances, preventing wholesale violations of the Constitution serves the public interest. *See Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974; *AFT*, 592 F. Supp. 2d at 905. As discussed above, collecting DNA from presumptively innocent persons fails to improve public safety and at the same time unnecessarily invades the bodies and privacy of tens of thousands of Californians every year. Americans have serious concerns about the use of their genetic information, and they expect protections when law enforcement are granted access to such information. (Katsanis Decl. at ¶ 24-25.) Granting this motion will uphold the Constitution and protect the privacy and constitutional rights of thousands of Californians.

IV. THE SCOPE OF THE INJUNCTION.

Attorney General Brown is the "chief law officer of the State" with a duty "to see that the laws of the state are uniformly and adequately enforced." Cal. Const. Art. V § 13. Brown supervises the operations of the California Department of Justice, which is responsible for ensuring that specimens are collected from arrestees and implementing the State's DNA database. Cal. Gov. Code §§ 12510, 15000; Cal. Penal Code § 295(g)-(h). After collection by local authorities, all seized DNA samples must be "forwarded immediately to the Department," where they are analyzed

[17] "The January 1, 2009, provisions governing DNA sample collection from adults arrested for any felony offense are not retroactive and so do not permit collection for arrests that took place prior to 2009." Meier Decl. at Ex. A (Cal. A.G. DNA Information Bulletin 08-BFS-02) at 1.

and stored. § 295(i)(1)(C), § 295.1. The Department directly controls local law-enforcement collection and processing of DNA samples from arrestees by issuing binding policy bulletins, as authorized by § 295(h)(1). (*See* Meier Decl., Exs. A, D.) Therefore, all law enforcement personnel who collect or analyze DNA from arrestees pursuant to § 296(a)(2)(C) do so as agents of Defendants Brown and Steinberger and will be bound by an injunction against the named defendants under Rule 65(d)(2). *See ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 163 (S.D.N.Y. 1997).

V. THE COURT SHOULD WAIVE ANY BOND REQUIREMENT.

Parties seeking preliminary injunctive relief typically post a bond, "in such sum as the court deems proper." Fed. R. Civ. P. 65(c). In public-interest cases such as this one, particularly where the class includes many persons of limited means, the court may require a nominal bond or no bond at all. *Brantley v. Maxwell-Jolly,* 2009 WL 2941519 at *14 (N.D. Cal. Sept. 10, 2009); *Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1086 (N.D. Cal. 1997).

This is a constitutional case seeking only equitable relief. Moreover, Plaintiffs (who are represented by pro bono counsel) are not in any position to post a bond in an amount that would be meaningful to the State of California. Thus, Plaintiffs ask that the Court waive the requirement of a bond or require only a nominal bond of $100.

VI. CONCLUSION

For all of the foregoing reasons, the Court should issue a preliminary injunction enjoining Defendants and their agents from seizing or analyzing biological samples for DNA analysis under the authority of California 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.

DATED: October 30, 2009

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